No. 1821

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit.

THE UNITED STEAMSHIP COMPANY (a corporation), claimant of the American steamer "Santa Rita", her tackle, apparel and furniture, and all persons intervening for their interests therein,
Appellants,

vs.

THOMAS HASKINS and MAX SCHWABACHER, partners doing business under the firm name of Leege & Haskins, Libelants,
Appellees.

BRIEF FOR APPELLANTS.

CHARLES PAGE,
EDWARD J. McCUTCHEN,
SAMUEL KNIGHT,
Proctors for Appellants.

Filed this.....day of March, 1910.

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

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BRIEF FOR APPELLANTS.

In this appeal, the United Steamship Company, claimant of the S. S. "Santa Rita", seeks only to review the question of the value, in its damaged condition, of certain coffees consigned to libelants, or appellees here, and discharged by the steamer at San Francisco. The commissioner to whom the question was referred by the court below, found that this value was 5¼ cents, while appellant contends that it was at least 6 cents a pound,

making a difference, on 152,764 pounds involved in this particular shipment (Leege & Haskins Apostles, pp. 110-113 et seq.), or 151,236 pounds, allowing for a shortage of 1,528 pounds claimed by appellees, of at least $1,145.73, or $1,1134.25 respectively, together with interest thereon from January 30, 1907, as found in the commissioner's report herein (Leege & Haskins Apostles, p. 27).

In the case of this appellant against A. Schilling & Company, pending in this court, precisely the same facts and question are involved, except that the shipment there in question consisted of 77,204 pounds, and the amount in issue $579.03, together with interest from the date last given (Schilling Apostles, p. 24), as the coffees consigned to both of these parties were handled together by the same people, and these cases were virtually tried before the commissioner and submitted together for decision.

THE FACTS REGARDING THE SALES OF THESE COFFEES.

The merchandise, in a damaged condition, was discharged by the steamer at San Francisco, January 30 and 31, 1907. Delivery thereof was taken, and freight paid, by the respective consignees, February 5 following, and the coffees were sold by O'Brien, a broker, at the instance of the insurance companies which had paid loss on these consignments, to another broker or jobber named Lewin, at San Francisco, the following day for 5¼ cents a pound (Apostles Leege & Haskins case, pp. 31, 49, 101-102, 108, 134).

Within two weeks from the time of their arrival, the same coffees were again sold by O'Brien, acting this

time as Lewin's broker, and shipped out of this state to certain eastern parties, on samples previously sent them, for 6¾ cents a pound, i. e., at a profit of about 1 cent a pound, or approximately $1500 on the Leege & Haskins consignment, and over $750 on the Schilling consignment, deducting all expenses and brokerage (Leege & Haskins Apostles, pp. 47, 48, 50, 51, 118, 136, 153; Schilling Apostles, pp. 65-66).

These coffees were hurriedly shipped out of the state before their resale (Leege & Haskins Apostles, p. 140).

The broker O'Brien incorrectly testified that Lewin only obtained on this resale 1 cent advance, on which he had made a profit of about half a cent (Leege & Haskins Apostles, pp. 51-52); whereas, as the evidence afterwards disclosed, and as Lewin subsequently admitted, the advance price was 1½ cents, thereby making, even on O'Brien's own testimony, at least 1 cent a pound profit (Leege & Haskins Apostles, pp. 141-148). The latter admitted that the deal was a pure speculation (Leege & Haskins Apostles, pp. 56-57).

Appellant had no knowledge whatsoever of these transactions until after they had been consummated (Leege & Haskins Apostles, pp. 102-103, 104, 105, 191). No claim had hitherto been preferred against it for the damage respectively sustained by libelants; no notice had been given to it that the coffees would be sold for whom it might concern; no public sale was made or sale on public notice; no opportunity was offered appellant to secure a bidder for the coffees, and thereby minimize the damage by obtaining the best price that they would bring;

and the first intimation it had of a claim of damage to these coffees was by a letter received from Schilling & Co., the consignee of some of the coffee in question, February 14, 1907 (Leege & Haskins Apostles, pp. 102-103), after all of the coffees had been sold and shipped out of the state.

On the same steamer, coffee damaged, *en route,* fully as much as, if not worse than, the coffees involved herein (Leege & Haskins Apostles, pp. 68, 107, 127-128, 189), and inferior in grade to the Schilling consignment (Schilling Apostles, pp. 79, 91-92), and of the same grade and in great part of the same kind as the Leege & Haskins coffees, had been transported to San Francisco consigned to Brandenstein & Company. Appellant was notified of the latter's claim for such damage, whereupon, in the month of August or September of the same year, on a somewhat weaker or more inactive market (Leege & Haskins Apostles, pp. 65-66, 67, 194), appellant effected a sale of the Brandenstein coffee in San Francisco for 6 cents a pound to coffee broker named Cambron, who succeeded to the well established business of the pioneer coffee broker of San Francisco (Leege & Haskins Apostles, p. 110), and who had known nothing of the sale of the other coffees, and had been given no opportunity of purchasing or making a bid for them (Leege & Haskins Apostles, pp. 64-65, 67-68, 73, 80, 84, 192). Cambron testified that he thought the coffee was worth more than that figure (Leege & Haskins Apostles, p. 67). His efforts to buy this coffee went back as far as June of that year (Leege & Haskins Apostles, p. 77).

This witness is the only one who testified respecting the extent to which the Santos coffee, forming the entire Leege & Haskins consignment and a good portion of the Brandenstein consignment, had been damaged, stating that the extent of such damage was twenty per cent; and, estimating its sound value at about 10 cents, he was of opinion that it had been damaged in value about 2 cents (Leege & Haskins Apostles, pp. 64, 66-67), which corroborates the price of 8 cents at which, it seems, he afterwards made a sale of this Brandenstein coffee, as we know by hearsay (Leege & Haskins Apostles, pp. 188-189). Appellant, however, only asks to be allowed the price at which Cambron purchased the coffee from Brandenstein, not the price for which he immediately thereafter sold it.

In his signed statement of January 28, 1909, offered as an exhibit, Lewin estimates his total expense connected with his two sales at $589.14, exclusive of brokerage which a sale to Cambron would have avoided and inclusive of $162.14 for new sacks and inclusive of expenses of drayage, etc., or approximately ¼ cent per pound.

Levinger, of Brandenstein & Company, one of appellees' witnesses, estimated that the cost of carrying coffee, including interest on money invested, "clearing" it, warehouse charges, insurance and loss in weight, "to be safe on the business",—yes, very safe,—was the high figure of one per cent per month, i. e., six per cent for the six months that the Brandenstein consignment was warehoused, after it was discharged from

the steamer (Schilling Apostles, p. 75). This means that it would have cost a little less than $500 on the Leege & Haskins coffee, and about half that amount on the Schilling coffee, according to this witness' figures; but he testified regarding these charges, when under examination by appellees' proctor, as follows:

"Q. About the time you sold that coffee you had incurred charges for warehousing, had you not?

"A. Yes.

"Q. Also for turning over the coffee; there had been some repacking, had there not?

"A. I do not think there was to M. J. Brandenstein & Company, if my memory serves me right. I think they put it in the warehouse, but it had to be put in sacks in order to get it to the warehouse.

"Q. Do you recollect as to that?

"A. No, I do not think we had any charges.

"Q. But charges had to be incurred, did they not, before the coffee could be sold?

"A. Yes, sir.

"Mr. KNIGHT. Q. Incurred by whom? Incurred I suppose by the man who purchased it?

"A. There was a charge. There was storage charges and insurance and so on going against the coffee.

"Mr. DENMAN. Q. Did you pay the insurance charges?

"A. I think our insurance man did for his own protection.

"Q. The warehouse charges you paid, did you not?

"A. I am not sure whether we paid it or how it was. I think that was settled at the final settlement.

"Q. There was also interest accruing during that operation?

"A. Yes, sir" (Schilling Apostles, pp. 73-74).

It does not appear that Brandenstein & Company paid any of the charges for carrying this coffee from the time it was discharged up to the time it was sold to Cambron. The latter testified that he did not pay the storage.

Lewin admits that he did not try to sell either the Leege & Haskins or the Schilling coffees in San Francisco (Leege & Haskins Apostles, pp. 153-155), nor did appellee Schilling & Company attempt to make a sale here of the coffee consigned to it (Schilling Apostles, p. 55), thereby directly contradicting appellees' premier witness O'Brien that these coffees had been offered to the big coffee houses here. Although Lewin was called by appellant, he was in the nature of an adverse witness whose interests were really with the appellees, since it was through the latter, or, the insurance companies which had taken the coffee off their hands, that Lewin had been given the opportunity of indulging in the speculation complained of at the expense of the ship.

In this respect, the record reads regarding his resale of these coffees:

> "Q. As soon as this man in St. Louis got the sample he wired you an offer of 6¾ cents?
>
> "A. He wired an offer of 6¾ cents and he got it.
>
> "Q. You wired an acceptance?
>
> "A. Yes, sir.
>
> "Q. So then the fellow who was not doing business by wire did not have a change (chance) to get that coffee?
>
> "A. Nobody does business by letter in the coffee trade. There is no one man that I send a sample to that I don't get a wire in five days—if I don't get a wire in five days then he don't get them any more.

"Q. Mr. Lewin, how do you know that you could not dispose of that coffee in San Francisco?

"A. In San Francisco?

"Q. Yes. Did you try to dispose of it?

"A. No; I will tell you the reason why: Mr. Folger, Mr. Schilling, Mr. Brandenstein and Mr. Hills and all those big reputable houses, they would not buy such coffee; they would never buy that damaged coffee.

"Q. Did you go around and ask them?

"A. Oh, I know; the same as you would not go around and buy a damaged thing.

"Q. So you assume because the coffee was damaged they would not handle it?

"A. I know they wouldn't handle that damaged coffee.

"Q. Therefore you assumed it was useless to go to them?

"A. Yes, entirely useless.

"Q. Did you ask Mr. Cambron if he would like to get the coffee?

"A. I had nothing to do with Mr. Cambron; he was a broker just like Mr. O'Brien; Mr. Cambron is a broker, and he has sold coffee for me. If I have got any coffee, and Mr. O'Brien takes the samples and goes around and shows it to the people, that is out of his hands.

"Q. Still why didn't you exhaust the coffee buyers here in San Francisco, that is the people that you thought might have handled the coffee before you sent the samples on to these eastern cities?

"A. It would have been a detriment to me—a big detriment.

"Q. A detriment to hawk the coffee about?

"A. It would have been a detriment to me to sell such coffee; they would be saying, 'Lewin is selling unsound coffee'. That is all my competitors would want me to do, to do that.

"Q. So that you did not want to get the reputation of handling coffee that had been damaged?

"A. That is the whole thing.

"Q. You wanted to get it out of here as soon as you could?

"A. That is it exactly.

"Q. Sort of save your reputation in the community?

"A. Yes, at least I tried to, and I tried to make anything honorable out of it. Now, talking about this thing here, I will tell you about a thing I had. I had 900 bags of coffee of the same nature and I lost $4,000 on it just six months before that on the same kind of a deal. I bought it and paid $4,000 out of my pocket on the same kind of a proposition.

"Mr. DENMAN. Q. Then such speculations are largely speculative in their nature?

"A. Yes. I lost the $4,000 in one transaction, on 900 bags of coffee.

"Mr. KNIGHT. Q. You felt you could get even on this shipment?

"A. I didn't feel sure, but I took the chance. You understand I am entirely out of this thing, either with the insurance company or Leege & Haskins, and I want to do the right thing; I don't care what way the case goes, because I am not interested in it at all" (Leege & Haskins Apostles, pp. 153-155).

The only excuse which appellees give for the indecent haste thus taken was fear of the condemnation of the coffees in question under the pure food laws (Leege & Haskins Apostles, pp. 34, 51, 54-57, 57-58, 138-139, 150). Examination, however, of these acts,

Penal Code of Cal., secs. 382-383b;

Act of the Legislature of Cal. of March 11, 1907 (Stats. 1907, p. 208);

Act of Congress of June 30, 1906 (34 Stats. at Large, p. 768),

shows that such fear was utterly groundless. They were passed to prevent the manufacture, sale or transportation of adulterated or misbranded foods, drugs and medicines; and in both the state and federal acts food is deemed to be adulterated

> "if any substance has been mixed or packed or mixed and packed with the food so to reduce or lower or injuriously affect its quality, purity, strength or food value * * * If it contains any added poisonous or other added deleterious ingredient."

These coffees were not subject to be condemned under any of these acts. They did not come within the inhibition contained in any of them; and, if they did, then all of the parties promoting these sales had committed an offense against the law and were punishable therefor by fine or imprisonment. These sales, then, are apparently defended on the ground that those who took part in them were justified in committing an offense against the law, providing they did it quickly and were not discovered in doing it. The law, however, never justifies the commission of crime for the purpose of minimizing the damage to anyone. If these coffees were by law unsalable, then they should not have been sold, and the ship should properly have been charged with the entire loss. If these coffees could have been thus condemned, then a violation of law was committed in order that a handsome profit might be made by a speculation at the ship's expense.

The action, however, of the parties directly concerned in these sales will bear deeper analysis, as the record

shows, especially in view of the admission which Mr. O'Brien makes before he leaves the witness-stand, that the pure food scare was not wholly responsible for the sale which was made to Lewin:

> "Q. Then the net result of your testimony is, as I understand it, that this scare really did not cut any figure in the price received in the sale to Lewin?
>
> "A. It did have some weight. Possibly it had weight. We had every reason to believe, and still believe, that the sale to Lewin was more that (than) a good one, for account of whoever it might concern.
>
> "Q. Well, if there had not been that scare would you have thought you ought to have got more from Mr. Lewin, or not? If you had never heard anything about that? Do you think you could have got more than five and a quarter cents? Or did you consider that you were getting all that the coffee was worth?
>
> "A. If we never had heard anything about it we would have recommended the sale to Lewin at five and a quarter cents.
>
> "Q. Then I don't see how you figure that that scare had any effect in the price obtainable.
>
> "A. It made us feel just that much more elated over the successful sale, as we construed it" (Leege & Haskins Apostles, pp. 57-58).

As before stated, in the Leege & Haskins and Schilling shipments, the sales were made for the account of certain insurance companies which had apparently paid the respective losses sustained by the shippers, and had taken over the coffees (Leege & Haskins Apostles, pp. 29, 30, 34, 37, 47, 48, 56, 119, 137, 164-165, 168, 178-179, 187). Claims had been made on the companies and recognized by the latter, on the ground that the damaged coffee was an actual or constructive total loss (Leege &

Haskins Apostles, pp. 34, 56). Witness O'Brien himself admitted that it was necessary for the consignees, according to the form of their insurance policies, to show that the coffee was a total loss (Leege & Haskins Apostles, p. 54); and, as their claims had been recognized by the local agents of the foreign insurance companies here, these agents were evidently anxious to justify their payment of these claims by showing that the coffee was not worth to exceed fifty per cent of the sound value, believing that they could recover from the steamer any discrepancy between such value and the price for which the coffees were actually sold. As a matter of fact these coffees were not a total loss, nor could they have been legally condemned. And so it coincidently appears that the Leege & Haskins coffees sold for just fifty per cent, i. e., 5¼ cents, of what was found to be their sound value, i. e., 10½ cents; and the Schilling shipment sold at the same time for a trifle less than fifty per cent, inasmuch as the sound value of that coffee was ascertained to be 11½ cents a pound. These facts are highly significant in view of the circumstances.

Fortunately, however, for the steamer, some evidence was afforded it of the real selling value of these coffees by the subsequent sale of the Brandenstein consignment, not conducted secretly and hastily, but in an open manner. O'Brien admitted that the sale to Lewin was a pure speculation on the latter's part (Leege & Haskins Apostles, pp. 56-57). It was abundantly established that there was a good legitimate market here for damaged coffees (Leege & Haskins Apostles, pp. 44, 45, 68-69; Schilling Apostles, pp. 45-46, 67, 68, 89-90, 93, 94-98),

and Cambron had not the slightest difficulty in reselling the coffee which he purchased.

Considerable of the record is taken up with testimony respecting the character of damage which the coffees in question suffered, i. e., from the fumes of creosote, which, it seems, would be to a great extent dispelled if the coffee were left open to the air, rather than kept tightly bottled or covered; but it must be borne in mind that the Brandenstein coffee which Cambron sold was a part of the same cargo, stowed in the same portion of the ship, and subject to the same fumes as the other coffees were, and, in fact, being somewhat lower in the hold than these other coffees, had commenced to sweat, thereby necessitating its discharge earlier than the master of the steamer had originally planned. No damage in these two cases can be asserted which was not also sustained by the Brandenstein coffee, and, therefore, the particular character of the damage which the coffees sustained becomes a negligible factor in the case. The sole question is, what were these coffees worth, whatever their condition may have been?

Appellees also endeavored to establish by O'Brien, who made both sales of the coffees in question as broker, by Lewin, the vendee at the first, and vendor at the second, of these sales, by Falkenham, his clerk, by another broker named Werlin, as well as by the consignees themselves, that the price obtained at the first of these sales, to-wit, 5¼ cents a pound, was a very good price for the coffee. An examination of the record, however, will show that all of these witnesses were

directly interested in the controversy, save Werlin, in minimizing the value of these coffees; and the consignees themselves disclaimed having much, if any, knowledge on the subject on the ground that they never knowingly handled coffees that had been damaged, and, therefore, were not acquainted with the condition of the market in that respect (vid., for instance, the testimony of Mr. Levinger, of Brandenstein & Company, Schilling Apostles, pp. 71, 77, 78, 79-80).

Appellant's complaint is that the manner in which the coffees in question were sold to Lewin did not furnish a fair indication of their value. If they had been sold in a public manner, on reasonable notice, or if claimant had been given an opportunity to have a voice in the disposition of the merchandise, no just criticism could have been made. Here, however, the sale was conducted in a most unusual manner. The pure food commission was played as the "bogie-man" to justify the quick sale and shipment of the merchandise out of the state, although no one was able to cite an instance where coffee similarly, or even worse, damaged had ever been destroyed.

If private sales of this character, made without the ship's knowledge, are to be justified on the testimony of the parties interested in making such sales that the merchandise was worth no more than the price obtained thereby, the carrier is at the mercy of the consignees to whom the goods have been delivered and is deprived of any opportunity of making its loss as light as possible either by purchasing the goods itself or finding a purchaser therefor.

We submit that the court should pay no attention to the testimony that 5¼ cents was the best price for which these coffees could be then sold, in view of the actual sale made by Cambron somewhat later, at an advance price. The men who participated in the sale complained of were too much interested therein to be impartial in their views. As the court said in the case of

The Richmond, 114 Fed. 208, 211:

> "No notice was given of the proposed experiments to the other parties in interest or their counsel. They were denied an opportunity to know as to the exact condition of affairs when the experiment was made, and, indeed, what was done and seen. At least notice ought to have been given, and an opportunity afforded those to be affected to be present before such testimony should be considered."

So, we contend here, that a public sale should have been held or at least notice of the intended sale to Lewin ought to have been gi[illegible] to the steamer, and an opportunity afforded i[illegible] take part therein, before testimony can be seri[illegible] considered by the court that the sale made was [illegible]e steamer's best interests, especially in view o[illegible] act that a subsequent sale at a higher figure [illegible]ively disclosed.

Th[illegible]rt will note the reasonableness of our position. As we have before stated, Cambron, who subsequently purchased the Brandenstein coffees, stated that the Santos coffee (which composed entirely the Leege & Haskins shipment and a large part of the Brandenstein shipment) was worth in this market, in sound condition, about 10 cents a pound, and had been damaged, when

removed from the ship, about twenty per cent. He said thereafter:

> "The variance in damage in the Santos coffee was very slight. The Santos coffee, I do not think, varied more, *in fact I demonstrated it by the sales that were afterwards made,* that the damage in the Santos coffee would not vary more than 5 or 6 per cent; in some slight case it might be 10 per cent."

In other words, the Santos coffee in its damaged condition was worth 8 cents a pound. We are, however, asking that the court establish its value at 6 cents a pound net at the time in question, as it is not clear that there were any expenses paid by Brandenstein & Co. in connection with the Cambron sale.

It is therefore respectfully submitted that the amount of the decree herein be reduced at least to the sum of $1,134.25, with interest thereon from January 30, 1907 (as found in the commissio[illegible]'s report herein), and costs hereof, and in th[illegible] Schi[illegible] jus[illegible]e to the sum of $579 with like interest and [illegible]osts.

[illegible]'nstan

CHARLES [illegible]ad ev[illegible]

EDWARD J. M[illegible]r,

SAMUEL KNIGHT[illegible] without

Proctors for [illegible]mony